STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 25, 2010
v	No. 290279 Wayne Circuit Court
CHRISTOPHER LEROME JOHNSON, Defendant-Appellant.	LC No. 08-006502-FC

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(ii), and was sentenced to 20 to 40 years' imprisonment for each conviction. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of sexually assaulting his daughter, "NJ." He first argues that he is entitled to a judgment of acquittal because the prosecutor failed to present sufficient evidence to support his convictions. We disagree. This Court reviews claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "When ascertaining whether sufficient evidence was presented in a bench trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). This Court will not interfere with the role of the trier of fact in determining the credibility of witnesses or the weight of the evidence and all evidentiary conflicts must be resolved in favor of the prosecution. *Kanaan*, 278 Mich App at 619. Moreover, circumstantial evidence and reasonable inferences drawn therefrom can constitute sufficient proof of the elements of an offense. *Id*.

A defendant commits first-degree criminal sexual conduct if he engages in sexual penetration with another person who is at least 13 but less than 16 years old and the victim is a blood relation. MCL 750.520b(1)(b)(ii). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body[.]"

NJ's testimony supports defendant's convictions. She testified that defendant, her biological father, engaged in vaginal-penile penetration and vaginal-oral penetration with her when she was 15 years old. Her testimony did not need to be corroborated to constitute sufficient evidence supporting defendant's convictions. MCL 750.520h; *People v Lemmon*, 456 Mich 625, 643 n 22; 576 NW2d 129 (1998). Moreover, contrary to defendant's argument, NJ's testimony did not contravene her preliminary examination testimony or her statements to the police in any material respect.

Although defendant relies on a November 8, 2006, letter purportedly written by NJ in which she asked to live with defendant in support of his argument, the letter does not contradict NJ's testimony. As the trial court recognized, nothing in the letter tends to show that defendant did not sexually assault NJ. Moreover, according to the date on the letter, it was written after only one of the sexual assaults occurred. NJ testified that the first assault occurred on July 28, 2006, and she did not thereafter return to defendant's residence until February 2007, before defendant committed the remaining sexual assaults. Thus, the letter does not tend to establish that NJ's testimony was untrue. In sum, the evidence was sufficient to support defendant's convictions.

Defendant also argues that the trial court's verdict was against the great weight of the evidence. We disagree for the same reasons previously discussed. The evidence did not "preponderate[] so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." See *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

Defendant next argues that he was denied the effective assistance of counsel. We again disagree. We review for clear error a trial court's findings in evaluating an ineffective assistance of counsel claim. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Further, whether a defendant was denied the effective assistance of counsel is a question of constitutional law that this Court reviews de novo. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorer*, 262 Mich App at 75-76. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma*, 462 Mich at 302.

Defendant argues that defense counsel was ineffective for not offering NJ's November 8, 2006, letter or question her regarding its contents. Defendant has not overcome the presumption that counsel's decision not to offer the letter was sound trial strategy. *Id.* In the letter, NJ referenced defendant as "my baby" and signed the letter "Daddy's Girl." She also asked defendant to get himself together. Defense counsel could have reasonably concluded that the tone of the letter was inappropriate and that NJ's request that defendant get himself together might indicate some wrongdoing on his behalf.

Defendant has also failed to establish prejudice because the letter does not indicate that defendant did not sexually assault NJ or otherwise contravene her trial testimony. In the letter, NJ stated that her family was moving to Atlanta and she wanted to stay in Detroit with defendant instead of moving. NJ asked that defendant get himself together to make this happen and revealed that she had had a boyfriend for the previous eight months. Although the letter was apparently written after one of the sexual assaults, it did not contradict NJ's testimony that defendant sexually assaulted her. Defendant has not demonstrated a reasonable probability of a different result had the letter been admitted as evidence or had counsel questioned NJ regarding the letter during trial. *Toma*, 462 Mich at 302-303; *Moorer*, 262 Mich App at 75-76.

Accordingly, defendant was not denied the effective assistance of counsel at trial, and the trial court therefore did not err by denying his motion for a new trial.

Finally, defendant argues that he is entitled to resentencing because OV 4 was improperly scored at ten points. We again disagree. Defendant preserved this issue by raising it in his motion for resentencing. MCL 769.34(10); MCR 6.429(C); *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

A sentencing court has discretion in determining the number of points to be scored for each variable, provided that record evidence adequately supports a given score. *Endres*, 269 Mich App at 417. Facts used to support a sentencing variable need only be proven by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A trial court's factual findings at sentencing are reviewed for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). Further, the proper application of the statutory sentencing guidelines presents a question of law that this Court reviews de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

MCL 777.34(1) allows a trial court to score ten points for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." The instructions provide that a trial court may score ten points if "the serious psychological injury *may* require professional treatment." MCL 777.34(2) (emphasis added). Thus, the fact that a victim did not seek professional treatment is not conclusive for purposes of scoring OV 4. *People v Wilkens*, 267 Mich App 728, 740-741; 705 NW2d 728 (2005).

The record shows that NJ suffered serious psychological injury as a result of defendant's sexual assaults. She stated at defendant's sentencing that she will continue to suffer pain "that can never be erased." In addition, she repeatedly testified during trial that she was scared of defendant and believed his threat to kill her if she told anyone what had occurred. A victim's testimony that she was fearful as a result of a defendant's conduct is sufficient to support a score of ten points under OV 4. See *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). Further, the trial court heard NJ's trial testimony and opined that, considering NJ's love for defendant, his actions, and her hopes for her future, there was no possibility that NJ did not suffer psychological injury. The trial court's consideration of NJ's demeanor and her description of events was proper. See *Wilkens*, 267 Mich App at 740-741. Therefore, the record supports

the trial court's ten-point score for OV 4 and defendant is not entitled to resentencing.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Alton T. Davis